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No. 82-1213

IN THE

Supreme Court of the United States

October Term, 1983

NEW YORK,

Petitioner,

against

BENJAMIN QUARLES,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE PETITIONER

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Questions Presented

1. Whether the Court of Appeals of the State of New York properly excluded the defendant's statement, "The gun is over there," as being elicited in violation of his federal constitutional rights where the police had probable cause to believe that he had just committed an armed felony and disposed of the gun in the immediate vicinity of where he was standing in a supermarket.

2. Assuming, *arguendo*, that question one is to be answered in the affirmative, whether the Court of Appeals of the State of New York properly excluded the defendant's gun, which was recovered from a carton a few feet from the defendant, and his later admissions of ownership thereof as fruits of the constitutional violation.

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals of New York, reported at 58 N.Y.2d 664, 458 N.Y.S.2d 520, 444 N.E.2d 984, appears in the appendix hereto (pp. 51a-59a).*

* Numerical references are to pages of the joint appendix.

Jurisdiction

The decision of the Court of Appeals of the State of New York was entered on November 18, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

The petition for a writ of certiorari was filed on January 17, 1983, and certiorari was granted on May 23, 1983. An extension of time in which to file the brief of the petitioner on the merits and the appendix was granted, thereby extending the time in which to file the brief and appendix to and including August 6, 1983.

Constitutional Provisions Invoked

FIFTH AMENDMENT

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

FOURTEENTH AMENDMENT

Section 1 ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Statement of the Case

Introduction

Acting upon apparently reliable information given to him by a woman who claimed to have been raped at gunpoint, a police officer found a man, the defendant, who precisely fitted this victim's description, at the precise place

designated by her, namely a supermarket. Apprehending the defendant, who was carrying an empty shoulder holster, after chasing him through the store, the officer (without giving any *Miranda* warnings) asked him where the gun was. The defendant indicated a carton a few feet away, and the officer there recovered a loaded revolver. As a result, the defendant was indicted for criminal possession of a weapon in the third degree.

Upon a motion to suppress both evidence of the defendant's statement about the revolver's location and the gun itself, a hearing was held upon both phases of the motion. The motion was granted in all respects by an order suppressing both the gun and the declaration, accompanied by an opinion.

Upon an appeal by the People to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, that order was affirmed without opinion. On appeal, by leave, to the Court of Appeals of the State of New York, the order of the Appellate Division, Second Judicial Department, was affirmed by a 4 to 3 decision.

The Evidence

On September 11, 1980, Police Officer **Frank Kraft** and his partner, Officer **Sal Scarring**, were in uniform and driving their patrol car eastbound on 47th Avenue and Francis Lewis Boulevard in Queens County, New York City, when they were approached by a young woman who stated that she had been taken to that location and raped by a man with a gun. Asking for the officers' assistance, she de-

scribed the rapist as a black man, approximately six feet tall, wearing a short black jacket with "Big Ben" in yellow letters on the back, and declared that he had gone into the A & P store on Francis Lewis Boulevard (16a-23a).

Kraft drove the woman to the front of the store which was about a quarter of a block north of the point where he had stopped (17a-23a). As Officer Scarring called for assistance, Kraft went to the front of the store (17a-24a). There, he saw the defendant—who matched the description given by the woman—approaching the checkout counter (17a).

Upon Kraft's appearance in the doorway, the defendant fled from the checkout counter to the rear of the store (17a-28a). Kraft gave chase, lost sight of the defendant for 15 or 20 seconds, overtook him, and told him to stop and put his hands over his head (17a, 28a-31a). As other police officers were arriving on the scene, Kraft frisked the defendant, discovering an empty shoulder holster, and then handcuffed his hands behind his back and asked him where the gun was (12a, 32a-33a). The defendant looked in the direction of a carton approximately four feet away and said, "the gun is over there" (12a, 18a, 34a-35a).

Kraft reached in the carton and found a loaded revolver —the subject of the *Mapp* phase of this motion (18a, 35a). He then informed the defendant that he was under arrest, read the *Miranda* warnings to him and asked him if he owned the gun, to which the defendant replied in the affirmative (18a, 21a, 36a). Kraft then asked where he had purchased it and the defendant said, "Miami, Florida" (21a).

The Decision on the Hearing

By order dated April 3, 1981, the hearing court granted the defendant's motion to suppress statements and physical evidence. In a memorandum decision accompanying the order, the hearing court stated that the defendant was "entitled to the *Miranda* warnings before any questioning as the police had reasonable cause to arrest and the officers' safety was not in question." A copy of the hearing court's order and memorandum decision appears in the joint appendix (39a-44a).

The Appeal to the Appellate Division

Upon appeal to the Appellate Division of the State Supreme Court, Second Judicial Department, the People contended that the single question, "where is the gun" did not constitute interrogation under *Miranda* v. *Arizona*, 384 U.S. 436 (1966) because it was a prudent protective measure attendant to the defendant's arrest and custody and that, even were the declaration of the defendant concerning the location of the gun to be deemed improperly obtained, the gun itself need not have been suppressed because it would inevitably have been discovered, even absent the statement. The Appellate Division, however, unanimously affirmed the hearing court's order without opinion. The order and statement of no opinion, reported at 85 A.D.2d 966, appear in the appendix hereto (48a-49a).

The Appeal to the New York Court of Appeals

On appeal, by leave, to the New York Court of Appeals, the People raised the same arguments as had been presented to the Appellate Division. By a 4 to 3 vote, the

Court of Appeals affirmed the order of the Appellate Division. In a memorandum decision, the majority reasoned that the "defendant's reponse to the police interrogation occurred while he was in custody, before he had been given the pre-interrogation warnings to which he was constitutionally entitled," and rejected the dissent's contention that there was a "sufficiently compelling noninvestigatory purpose" for the question which obviated the necessity for *Miranda* warnings. The full texts of the majority and dissenting opinions appear in the appendix hereto (pp. 51a-59a).

Summary of Argument

The precise issues to be determined in this case are (1) whether the defendant's statement, "The gun is over there," must be suppressed as having been elicited in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and (2) if so, whether the revolver itself and the defendant's admission of ownership regarding it, elicited after proper *Miranda* warnings were administered, must be suppressed as fruits of the initial violation.

Because Police Officer Kraft had probable cause to believe that the defendant had just committed an armed felony and disposed of a gun in the immediate vicinity where he was standing in a supermarket, the single question "where is the gun?" which elicited the declaration regarding the location of the weapon, was a prudent protective measure, designed to neutralize the threat of physical harm to anyone in the vicinity and was not proscribed by *Miranda*. While this Court has never determined the cir-

cumstances under which express questions asked of a person in custody without the benefit of *Miranda* warnings may be permissible, numerous state and lower federal courts have held that some such questions are not proscribed. In particular, questions concerning the location of weapons in the immediate vicinity have generally been held to be reasonble. Just as exigencies of various sorts can justify the police in conducting searches without a warrant, exigent circumstances, such as the likely presence of a gun in the immediate vicinity of an arrest for an armed felony in a supermarket, can justify the police in questioning a suspect in a limited manner without administering *Miranda* warnings, for the purpose of eliminating those circumstances. Since the actions of Officer Kraft were not blameworthy, there is no reason to suppress the evidence obtained as a result of those actions.

Even if the defendant's statement, "The gun is over there," be deemed to have been elicited in violation of *Miranda*, the revolver itself, and the subsequent declarations concerning it, need not be suppressed as fruits of this violation. In *Michigan* v. *Tucker*, 417 U.S. 433 (1974), this Court held that a violation of the prophylactic rules of Miranda which were designed to protect the Fifth Amendment right against self-incrimination is not necessarily a violation of the Fifth Amendment itself. Thus, while a statement elicited in violation of *Miranda* must be suppressed on the authority of *Miranda*, evidence obtained derivatively therefrom is not *per se* inadmissible (417 U.S. at 446). Rather, the nature of the particular violation must be balanced against the interest in making relevant, trustworthy evidence available to the trier of fact (417 U.S. at 450). In the case at bar, even if it be determined

that Officer Kraft acted improperly, there can be no doubt that he did so in good faith and not willfully or negligently. His single question was directed to the location of the gun and, as soon as the gun was secured, he issued *Miranda* warnings to the defendant. Under the circumstances, the deterrent value of excluding the gun from evidence is far outweighed by the societal cost of letting the defendant go free.

Even if Officer Kraft's actions be deemed so flagrant a violation of *Miranda* as to constitute a violation of the Fifth Amendment as well, however, the defendant's revolver and subsequent declaration of ownership thereof need not be suppressed because they would inevitably have been discovered absent his initial statement. Snce the police knew with a high degree of certainty that there was a gun in the immediate vicinity of where the defendant was standing in the supermarket, there can be no serious doubt that they would have looked in the carton four feet away without the defendant having looked in its direction and declared that "the gun is over there." Having secured the gun without the defendant's declaration, they would have followed the same procedures with regard to *Miranda* warnings and subsequent questioning as they did after securing it with his statement. Since the initial declaration was not, therefore, the sine qua non of the discovery of the gun and of the subsequent statements, the defendant is not entitled to suppression of them as "fruits" of the alleged violation.

POINT ONE

The Defendant's Declaration Concerning the Location of His Revolver Was Properly Elicited and Evidence Thereof Should Not Be Suppressed.

The evidence adduced at the suppression hearing established that Police Officer Frank Kraft had compelling reasons to believe that a man whom he found in a supermarket, namely the defendant, had just committed a rape at gunpoint; that, upon seeing the uniformed officer, the defendant fled to the rear of the store; that Kraft pursued, captured and frisked him there, discovering an empty shoulder holster on his person; that, after handcuffing him, Kraft immediately asked him where the gun was; that the defendant, looking in the direction of a carton a few feet away, declared that it was "over there"; and that Kraft then retrieved a loaded revolver from the carton. Under these circumstances, the single question, "where is the gun?" was a prudent protective measure attendant to defendant's arrest and custody and, thus, did not constitute interrogation within the meaning of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), or require the so-called *Miranda* warnings.

In *Miranda* v. *Arizona, supra,* this Court held that prosecutors may not use statements stemming from custodial interrogation of a defendant unless they demonstrate the use of procedural safeguards to secure the privilege against self-incrimination. The Court suggested that, prior to any custodial interrogation by a law enforcement officer, a defendant should be advised that he has the right to remain silent, that anything he says can be used against

him, that he has the right to consult with an attorney and to have an attorney present during the interrogation, and that, if he cannot afford an attorney, one will be appointed to represent him. The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" (384 U.S. at 444), and distinguished this from "general on the scene questioning as to facts surrounding a crime" (*Id.* at 477).

In each of the four cases decided by the *Miranda* opinion, "law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession." (*Id.* at 440). Each defendant was questioned "in a room in which he was cut off from the outside world . . . incommunicado" (*Id.* at 445). In explaining the need for pre-interrogation warnings, the Court discussed the prevalence of "police brutality—beatings, hangings, whipping"—as well as "sustained and protracted questioning incommunicado in order to extort confessions" (*Id.* at 446); and it cited interrogation manuals stressing that the major qualities which an interrogator should have are patience and perseverance (*Id.* at 450). Concern was expressed that confessions so extorted might be false and that reliance on them might make law enforcement officials less zealous in searching for objective evidence (*Id.* at 447).

The case at bar exhibits none of the evils which the *Miranda* opinion was designed to eradicate. Rather, the defendant was asked a single question, in a public place, for the protection of everyone in the vicinity, and this

question led to objective evidence (the gun) which was itself corroborative of the defendant's statement. Since, then, the circumstances which gave rise to *Miranda* are not present in the instant case, the warnings designed to eliminate, or mitigate, those circumstances were not necessary.

There can be little doubt that when the police surrounded and handcuffed the defendant he was in custody within the meaning of *Miranda* [*Orozco* v. *Texas*, 394 U.S. 324, 327 (1969)]. To characterize the single question asked him as an "interrogation," however, is to stretch the meaning of that word beyond all usefulness. Indeed, within three months of the *Miranda* opinion, one commentator pointed out that "not all questions, isolated questions, associated, you might say, as the res gestae of the arrest or perhaps in the booking process at the station are covered by the limitation on interrogation." [Professor Louis B. Schwartz, "Criminal Justice in the Mid-Sixties: Escobedo Revisited," *Proceedings of the Twenty-Ninth Annual Judicial Conference Third Judicial Circuit of the United States*, September 8, 1966 (42 F.R.D. 437, 467).]

This Court, however, did not define the term "interrogation" for purposes of *Miranda* until *Rhode Island* v. *Innis*, 446 U.S. 291 (1980). Specifically, *Innis* held that, in addition to express questions, the term "interrogation" under *Miranda* encompasses the "functional equivalent" of express questioning, which was defined as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect (446 U.S. at 301).

If the *Innis* standard for determining what constitutes the "functional equivalent" of express questioning were to be applied to the express question asked in the case at bar, that question should not be considered interrogation; a question about the location of a weapon must be considered "normally attendant to arrest and custody" in any situation in which a police officer has reason to believe that a suspect is armed or has recently disposed of the weapon in such a manner as to prove a threat to the police or other individuals at the scene. In *United States* v. *Bennett*, 626 F.2d 1309, 1313 (5th Cir. 1980), *cert. denied*, 449 U.S. 1092 (1981), it was held that the statement of one police officer to the other that "there's a gun in the car" did not constitute interrogation because "those words and actions, which are necessary or appropriate to inform fellow officers of a potential threat to their own safety and that of others in the course of an arrest or custody are normally attendant." Moreover, the court stressed that this was so regardless of whether the defendant had been restrained at the time, a matter which was the subject of dispute, "as even restrained suspects have been known to escape." There is no reason why this reasoning should not apply equally to a question, such as the one asked of the defendant in the case at bar, which is necessary and appropriate to removal of a potential threat.

More fundamentally, however, the plain language of *Innis* establishes that the reasonably likely standard applies only to words or conduct short of express questioning [*United States* v. *Hinckley*, 525 F.Supp. 1342, 1355 (D.D.C. 1981) *aff'd* 672 F.2d 115 (1982)]. Since this Court determined that the conduct of the police officer was not the

functional equivalent of express questioning, there was no occasion for deciding the issue of what type of express questions, under what circumstances, might not be considered interrogation [See, *United States* v. *Foskey*, 636 F2d 517, 522 n.3 (D.C.Cir. 1980)]. Accordingly, that is an issue which has never been decided by this Court.

While the issue is a novel one for this Court, numerous state and lower federal courts have, in the 17 years since *Miranda*, held that certain types of express questions, under some circumstances, do not constitute interrogation under *Miranda*. "Booking" or "pedigree" questions, for example, are generally not considered interrogation [See, *inter alia*, *United States ex rel. Hines* v. *LaVallee*, 521 F.2d 1109 (2d Cir. 1975) *cert. denied sub nom. Hines* v. *Bombard*, 423 U.S. 1090 (1976); *State* v. *Rassmusen*, 92 Idaho 731, 440 P. 2d 837 (1969); *Clarke* v. *State*, 3 Md. App. 447, 240 A.2d 291 (1968); *People* v. *Hernandez*, 69 Cal. Rptr. 448 (Cal. App. 1968)].

One large group of cases holding express questions not to constitute interrogation is based on the language in *Miranda* permitting "general on the scene questioning as to facts surrounding a crime." (384 U.S. at 477). It included questions considered "routine" [*State* v. *Cobb*, 539 P.2d 1140 (Ore. App. 1975); *People* v. *Wright*, 258 Cal. App. 2d 762, 66 Cal. Rptr. 95 (2d Dist. 1968) *cert. denied* 393 U.S. 896 (1968)], "threshold" [*Neal* v. *State*, 152 Ga. App. 404, 263 S.E. 2d 185 (1979); *Shy* v. *State*, 234 Ga. 816, 218 S.E.2d 599 (1975)], "neutral" [*State* v. *Simoneau*, 402 A.2d 870 (Me. 1979); *State* v. *Taylor*, 343 A.2d 11 (Me. 1975)], "preliminary" [*State* v. *Cavegn*, 294 N.W.2d 717

(Minn. 1980), *cert. denied* 449 U.S. 1017 (1980)], "casual, lone and conversational" [*State* v. *Persinger*, 437 P.2d 867 (Wash. 1967)], part of the "res gestae of the arrest" [*Parsley* v. *State*, 453 S.W.2d 475 (Crim. App. Tex. 1970)], or for the purpose of determining the nature of the situation confronted. [*Aldridge* v. *State*, 247 Ga. 141, 274 S.E.2d 525 (1981); *Owens* v. *United States*, 340 A.2d 821 (D.C. App. 1975); *Jordan* v. *Commonwealth*, 222 S.E.2d 573 (Va. 1976)]. Regardless of the varying formulations, what each of these cases has in common is a recognition, either explicit or implicit, that the exception recognized in *Miranda* for general on-the-scene questioning is not limited to non-custodial situations. In each case, the nature of the questioning, rather than the degree of control exerted by the police, was dispositive in determining that a custodial interrogation had not taken place.

Questions concerning the presence of firearms in the immediate vicinity of the police-citizen encounter have almost always been held not to constitute interrogation. Often, courts faced with such questions have used one of the formulations of the on-scene questioning exception to express their reasoning. Thus, these questions have been termed "an on the scene investigation of an emergency situation" [*State* v. *Holsclaw*, 42 N.C. App. 696, 257 SE 2d 650 (1979)], "threshold" [*Tucker* v. *State*, 237 Ga. 777, 229 S.E.2d 617 (1976)], "routine" [*People* v. *McIntosh*, 53 Ill. App. 3d 950, 11 Ill. Dec. 763, 369 N.E.2d 217 (1st Dist. 1971)], "on-the-scene questioning designed to determine what had occurred" [*State* v. *Heath*, 122 Ariz. 6, 592 P. 2d 1302 (Ariz. App. 1979] and "part of the res gestae" [*People* v. *Toler*, 45 Mich. App. 156, 206 N.W.2d 253 (1973); *State* v. *Dhaemers*, 150 N.W.2d 61 (Minn. 1967)]. Most courts, however, have recognized that, in addition to the

ordinary reasons for permitting on-scene questioning, questions concerning the presence of weapons provide additional compelling justification—the protection from harm of the police officer and, where applicable, others present. [*United States* v. *Castellana*, 500 F.2d 325 (5th Cir. 1974); *United States* v. *Ganter*, 436 F.2d 369 (7th Cir. 1970); *State* v. *Heath*, *supra*; *State* v. *Levy*, 292 So. 2d 220 (La. 1979); *State* v. *LaRue*, 19 Wash. App. 841, 578 P.2d 66 (1978); *Pope* v. *State*, 478 P.2d 801 (S.C. Alaska 1977); *Tucker* v. *State*, *supra*; *People* v. *Copperwohl*, 59 Mich. App. 745, 229 N.W.2d 913 (1975); *People* v. *Mullins*, 532 P.2d 733 (Colo. 1975); *People* v. *Toler*, *supra*; *State* v. *Lane*, 467 P.2d 304 (S.C. Wash. 1970); *People* v. *Brown*, 266 N.E.2d 131 (Ill. App. 1st Dist. 1970); *People* v. *Superior Court for County of Santa Clara*, 3 Cal. App. 3d 491, 83 Cal. Rptr. 771 (1st Dist. 1970); *People* v. *Ramos*, 17 Mich. App. 515, 170 N.W.2d 189 (1969); *Ballew* v. *State*, 441 S.W.2d 453 (Ark. 1969); *State* v. *Dhaemers*, *supra*.] These cases are manifestations of the general rule that, where there is a "sufficiently compelling noninvestigatory purpose for asking questions of a suspect who has not been informed" of his *Miranda* rights, courts should allow "any statements made in response to the questions to be used by the prosecution at trial." [*Harryman* v. *Estelle*, 616 F.2d 870, 874-5 (5th Cir. 1980)].

The hearing court's finding that the officer's safety was not in question does not dictate a conclusion that Officer Kraft's actions were unjustified. As in *United States* v. *Castellana*, *supra*, *at* 327, where the trial court had held that the F.B.I. agents had not felt physically threatened, "the mild measures adopted were justified by a reasonable prudence under the circumstances and did not require an

actual fear of imminent harm to validate them." Similarly, in *United States* v. *Ganter, supra,* at 370, the defendant "rather obviously did not have the gun on him at the time" of the question concerning its location inasmuch as he was without his clothing, in *State* v. *Lane, supra,* the defendant was handcuffed and surrounded by police officers, and in *People* v. *Toler, supra,* the defendant had been shot, arrested, and patted down for weapons. In each case, however, the officer's question was deemed to have been reasonably prudent under the circumstances.

Apart from any danger to the police, moreover, Officer Kraft's question concerning the location of the gun appears as a most reasonable and salutary measure to protect other persons—members of the public—from possible consequences of a finding of the gun by a third person. (*State* v. *Heath; Pope* v. *State; Tucker* v. *State; People* v. *Mullins;* Cf., *State* v. *Lane, supra.*) It was a virtual certainty that this firearm—likely a loaded one, as was actually the case—had just been disposed of by the defendant in the supermarket and was lying somewhere in the store, amenable to discovery by any person in the vicinity, adult or child. Wholly apart from the main task of investigating and prosecuting the rape charge against the defendant, therefore, Officer Kraft surely was under a duty of unearthing that weapon as expeditiously as possible. Had he had similar reason to believe that a bomb was lying about, his obligation in the matter would, of course, have been indisputable. [*Cronk* v. *State,* 445 N.E.2d 882, 884 (Ind. App. 1st Dist. 1983).] That the weapon was, instead, a probably loaded pistol, involving a lesser risk of public peril, does not affect the basic obligation of the officer. In

this setting, it would hardly have been reasonable for him to engage in the *Miranda* rituals with the defendant with a view to playing a treasure hunt type of game in the not unlikely event that the defendant refused to cooperate in the retrieving of the gun. While it undoubtedly would have been found by an assiduous police search in time, it is difficult to acclaim a rule that would penalize the police by means of evidentiary exclusion for quickly disposing of this problem by a four-word question to the defendant.

An alternative rationale for the admissibility of questions regarding the location of weapons in the immediate vicinity of the police-citizen encounter is the doctrine of emergency or exigent circumstances. Under this doctrine, it is unnecessary to decide whether the question should be characterized as "interrogation" under *Miranda* because the presence of exigent circumstances is deemed to override the necessity for compliance with *Miranda*. While this Court has never decided whether exigent circumstances can justify the police in asking a question of a person in their custody without providing *Miranda* warnings, it has made it abundantly clear that exigencies of various sorts can justify the police in conducting searches or making seizures without a warrant. [See, *inter alia*, *Warden* v. *Hayden*, 387 U.S. 294 (1967) (hot pursuit); *Schmerber* v. *California*, 384 U.S. 757 (1966) (destruction of evidence); *Michigan* v. *Tyler*, 436 U.S. 499 (19783 (fire); *Terry* v. *Ohio*, 391 U.S. 1 (1968); *Adams* v. *Williams*, 407 U.S. 133 (1972); *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977) danger).] In *Mincey* v. *Arizona*, 437 U.S. 389, 393 (1978), the Court stated that "The need to protect or preserve life or avoid serious injury is justification for what would be

otherwise illegal absent an exigency or an emergency." There is no reason why this general rule should not apply equally to asserted violations of *Miranda* and the Fifth Amendment as to asserted violations of the Fourth Amendment. The courts of several states have already explicitly done so.

The exifent circumstances doctrine has been most fully developed in California, which anticipated the *Miranda* requirement of preinterrogation warnings in *People* v. *Dorado*, 42 Cal. Rptr. 169, 398 P.2d 361 (1965). Subsequent to *Dorado*, but prior to *Miranda*, the California Supreme Court decided in *People* v. *Modesto*, 42 Cal. Rptr. 417, 398 P.2d 753 (1965) that statements made in response to questioning in the absence of warnings were admissible where the investigatory purpose of the questioning was "inextricably interwoven" with the purpose of rescuing a victim of a crime. The "Modesto Doctrine," as it came to be known, was held to survive *Miranda*, and further explicated, in *People* v. *Dean*, 39 Cal. App. 3rd 875, 114 Cal. Rptr. 555 (4th Dist. 1974) and *People* v. *Riddle*, 83 Cal. App. 3rd 563, 148 Cal. Rptr. 170 (2d Dist. 1978) *cert. denied*, 440 U.S. 937 (1979). *Dean* pointed out that "While life hangs in the balance, there is no room to require admonitions concerning the right to counsel and to remain silent." (114 Cal. Rptr. at 559). *Riddle* isolated two assumptions underlying *Miranda*—that the purpose of interrogation was to further criminal prosecution and that it was necessary to outlaw police misconduct—and found them to be irrelevant to an emergency situation in which the objective of the police is to save lives.

In California, the "Modesto Doctrine" has generally been applied to the attempted rescue of kidnap victims or

the location of missing people. Other states, however, have used the same reasoning in other contexts. Thus, in *Commonwealth* v. *Hankins*, 293 Pa. Super. 391, 439 A.2d 142, 144 (1981), it was held that the question "where are the others?", asked of a defendant in custody during a robbery in progress, did not violate *Miranda*. Citing *United States* v. *Castellana*, *supra*, and *Harryman* v. *Estelle*, *supra*, the court held: "Where a question is necessary to insure the safety of bystanders or police officers, and time is a crucial factor, we feel that there is a sufficient state interest to override the necessity of reading *Miranda* warnings."

In *Cronk* v. *State*, *supra*, 443 N.E.2d 882, 884, police officers questioned the defendant about the location and method of detonation of a bomb. In a well reasoned opinion, the court stated that "it might be argued that such questioning was not within the definition of interrogation" under *Miranda* because it "was not intended to elicit incriminating evidence." Instead, however, the court chose to hold that the "questioning was within a necessary exception to the *Miranda* requirement," analogous to the Fourth Amendment emergency doctrine, which was defined in language virtually identical with that found in *Hankins*. While, as indicated, the danger of the bomb in *Cronk* might have been greater than the danger of the gun in the instant case, the reasoning is equally applicable. Indeed, elements of the emergency doctrine can be seen in the opinions in *Pope* v. *State*, *supra*, and *State* v. *Lane*, *supra*, both dealing with questions regarding the presence of guns in the immediate vicinity of the questioning.

In *Terry* v. *Ohio*, *supra*, at 123 this Court said:

> Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty and thousands more are wounded. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

It is undisputed in the case at bar that Officer Kraft was justified in frisking the defendant to see if he was armed, and, indeed, searching him and the immediate area incident to his arrest [*Chimel* v. *California*, 395 U.S. 752 (1969)]. Under the circumstances, the single question "where is the gun?", was no more intrusive than the frisk itself. [*United States* v. *Castellana*, *supra*; *Parkhurst* v. *State*, 628 P.2d 1369 (S.C. Wyo. 1981); *Pope* v. *State*, *supra*; *State* v. *Levy*, *supra*.] Further, when Officer Kraft found an empty shoulder holster, he reasonably believed that there was a gun in the supermarket within a close range of himself, his fellow officers, and the public. To require him to provide *Miranda* warnings to the defendant before asking "where is the gun?" would clearly subject him to unnecessary risk in the performance of his duties. This question was a prudent measure to neutralize the threat of physical harm to anyone in the vicinity which could result

from the discovery of the gun by a friend of the defendant, a curious child, or anyone else who, for any reason, might decide to use it. Police should not be discouraged from taking such measures by requiring them to administer *Miranda* warnings before doing so.

Regardless of whether one says that the question "where is the gun?" does not constitute interrogation because it was part of the *res gestae* of the arrest or because it was designed to clarify the nature of the situation or to protect the officers and the public rather than to elicit an incriminating response, whether one says that it falls within an emergency exception which overrides the necessity of *Miranda* warnings or whether one analogizes it to a protective search, the conclusion is inescapable that the question was a reasonably prudent one under the circumstances. Since the question was proper, there is simply no reason to exclude from evidence the answer, or any evidence obtained derivatively therefrom. That a guilty person may be incriminated thereby is merely a fortuitous circumstance.

POINT TWO

The Defendant's Revolver Was Properly Recovered By the Police, and His Subsequent Declaration of Ownership Properly Elicited, and They Should Not Be Excluded from Evidence.

Since the revolver in question was not recovered from the defendant's person but from a carton where he had deposited it, it was not the product of a search and seizure, unlawful or otherwise, and no Fourth Amendment viola-

tion or claim is here involved. If there was any constitutional infringement, it was of a Fifth Amendment nature relating to the previously discussed declaration of the defendant which immediately led to the recovery of the weapon. Accordingly, if, as we maintained (Point One, *supra*), that declaration was not unconstitutionally or improperly obtained, there would seem to be no basis for suppression of the gun or of the defendant's subsequent statements either. In short, the contention with respect to the gun would fall along with that addressed to the declaration.

Even were the declaration to be deemed improperly obtained, however, such should not taint the admissibility of the gun itself for two reasons. First, the question asked by Officer Kraft, if improper at all, can not be deemed more than a good faith violation of the prophylactic rules prescribed by *Miranda* v. *Arizona* to safeguard the Fifth Amendment; accordingly, no purpose would be served by suppression of evidence obtained derivatively therefrom. Second, even if the question be deemed a violation of the constitution itself, the defendant's revolver and subsequent declaration of ownership thereof need not be suppressed because the revolver would inevitably have been discovered absent the initial declaration regarding its location. Each of these points will be discussed in turn.

A. Evidence Obtained Derivatively from a Good Faith Violation of *Miranda* Need Not Be Suppressed.

Reacting to a volatile situation on the spur of the moment, Officer Kraft asked the defendant about the location of his weapon after handcuffing him and before issuing *Miranda* warnings. Immediately after securing the gun,

Kraft administered warnings to the defendant. Two years later, three members of the New York Court of Appeals determined that the cold record of the suppression hearing was sufficient to establish that "the police responded to an emergency situation in an entirely reasonable manner" (54a) and that "the danger posed to the general public in this case due to the officer's inability to locate a loaded weapon . . . certainly provides a sufficiently compelling noninvestigatory purpose for questioning defendant about the gun's location without first warning defendant of his *Miranda* rights" (57a-58a). Four members of the court, however, were of the opinion that the record was insufficient to establish these conclusions. Under the circumstances, even if the majority is correct that Officer Kraft acted improperly, it can hardly be contended that he did so willfully or negligently, rather than in good faith [Cf., *State* v. *Williams*, 285 N.W.2d 248, 261 (Iowa, 1979), *cert. denied*, 446 U.S. 921 (1980)]. Accordingly, even if the defendant's statement about the location of the gun must be suppressed because it was elicited in violation of *Miranda* (a point which we vigorously dispute in Point One, *supra*), no purpose would be served by suppression of the gun itself and the defendant's subsequent admission of ownership thereof.

In *Miranda* v. *Arizona*, *supra*, this Court held that statements elicited without the prophylactic measures there prescribed may not be used in the prosecution's case in chief (*Id.* at 445). The Court did not directly address the issue of the admissibility of evidence obtained as a result of such statements, nor, for that matter, of the collateral uses to which the statements themselves might be

put. While the opinion contained some language to the effect that "no evidence obtained as a result of [illicit] interrogation can be used against" the defendant (*Id.* at 379), this language has been considered dictum rather than dispositive of the substantial issues a broad reading would entail.

The Court had an opportunity to decide the issue in *Orozco* v. *Texas, supra,* but declined to do so. In *Orozco,* the Court suppressed the defendant's statement as to the location of a weapon but made no comment regarding the admissibility of the gun itself.

In *Harris* v. *New York,* 401 U.S. 222 (1971), this Court held that statements made by a defendant in custody without being advised of his right to appointed counsel could be used to impeach the defendant's credibility should he testify at trial. The Court stated (at p. 224):

> Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.

Noting that there had been no suggestion that the defendant's statement had been coerced or involuntary in the traditional sense, the Court then determined that the

benefits to the jury in assessing the defendant's credibility exceeded "the speculative possibility that impermissible polict conduct will be encouraged thereby" (*Id.*, at 224-25). This Court later employed this same reasoning to permit the use for impeachment purposes of a statement elicited after the defendant had stated that he had wished to consult an attorney but had not yet done so [*Oregon* v. *Hass*, 420 U.S. 714 (1975)].

The Court first dealt with the issue of the use of evidence derivatively obtained from a *Miranda* violation in *Michigan* v. *Tucker*, 417 U.S. 433 (1974). The *Tucker* majority explicitly refuted the concurring Justice Brennan's contention that *Miranda*, if applied retroactively, would require suppression of the derivative evidence involved—the testimony of a witness who was discovered as a result of the defendant's statement (*Id.*, at 451, n.26).

Thus approaching the issue as a novel one, the Court first determined that the police conduct complained of—the questioning of the defendant without warning him of the right to have counsel appointed—did not deprive the defendant of his privilege against self-incrimination as such but only violated the prophylactic rules developed to protect that right inasmuch as it bore no "resemblance to the historical practices at which the right against compulsory self-incrimination was aimed" (*Id.* at 444). Since there was no constitutional violation, the Court concluded, the test laid down in *Wong Sun* v. *United States*, 371 U.S. 471 (1963) for determining when evidence obtained derivatively from a constitutional violation must be suppressed (see Point Two B, *infra*), was inapplicable. It was therefore

necessary "to examine the matter as a question of principle" (*Id.* at 476).

Citing the language in *United States* v. *Calandra*, 414 U.S. 338, 347 (1974) to the effect that the prime purpose of the exclusionary rule is to deter future unlawful police conduct, the Court found that the rationale loses much of its force when the official action is pursued in complete good faith (*Id.* at 446-47). Accordingly, whatever deterrent effect the exclusion of the defendant's statement might have had would not be "significantly augmented" by excluding the derivative evidence as well (*Id.* at 448).

The second rationale for excluding the derivative evidence which the Court examined was the protection of courts from reliance on untrustworthy evidence. Here, the Court concluded that there was no reason to doubt the trustworthiness of the derivative evidence—the testimony of the witness who was discovered as a result of the defendant's statement—merely because the defendant was not fully informed of his rights before identifying the witness (*Id.* at 449). Thus finding the reason for exclusion of the derivative evidence unpersuasive, the Court balanced them against "the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce" and found that the latter interest outweighed the former ones (*Id.* at 450-51).

While *Tucker* involved a defendant who received partial warnings and who was interrogated prior to the *Miranda* decision and a live witness as the derivative evidence, none of these factors were prerequisites to the Court's analysis.

First, the Court noted that *Miranda* was applicable and did require the exclusion of the defendant's statement because the defendant's trial occurred after the *Miranda* opinion [*Id.* at 448; See, also, *Johnson* v. *New Jersey*, 384 U.S. 719 (1966)]. Second, the fact that the defendant had been given partial warnings was merely the particular factor in that case which established the police officer's good faith; there was no suggestion that this was the only possible factor which could do so. Finally, derivative physical evidence is likely to be more trustworthy, if anything, than derivative testimonial evidence. For these reasons, state and lower federal courts have applied *Tucker* to interrogation occurring after *Miranda* [*United States ex rel. Hudson* v. *Cannon*, 529 F.2d 890 (7th Cir. 1976); *State* v. *Cook*, 170 N.J. Super. 499, 406 A.2d 1340 (1979); *People* v. *Kusowski*, 403 Mich. 653, 272 N.W.2d 503 (1978); *Bartram* v. *State*, 33 Md. App. 115, 364 A.2d 1116 (1976), *aff'd* 280 Md. 616, 374 A.2d 1114 (1977); *Rhodes* v. *State*, 530 P.2d 1199 (Nev. 1975)], in the absence of warnings [*Hudson, supra; Cook, supra; Bartram, supra;* and *Rhodes, supra*), and to derivative physical evidence (*Cook, supra; Rhodes, supra*).

Applying the *Tucker* rationale to the case at bar, it becomes clear that the same result as was there obtained is mandated. Certainly, the conduct of Officer Kraft bore little resemblance to the historical practices which resulted in the right against compulsory self-incrimination. As in *Bartram* v. *State, supra*, 364 A.2d at 1145:

> There was no suggestion that the [defendant] was forced, coerced or threatened in any way to make a confession. There was no prolonged period of incommunicado detention sweeping [him] away from famil-

> iar surroundings or denying [him] sleep, food or drink. There were no inducements or promises made to [him] to obtain a confession. By traditional, pre-*Miranda* standards, there was not a glimmer of that type of involuntariness that is the product of a will overborne.

Accordingly, if there was any improper conduct on the part of Officer Kraft at all, it would only be a violation of the prophylactic rules of *Miranda* rather than of the constitutional right against self-incrimination. The *Wong Sun* test is therefore inapplicable and it is necessary to balance the benefits of exclusion of the evidence against the detriment of doing so.

An in *Harris* and *Tucker*, the possibility that future police misconduct will be deterred by suppression of the derivative evidence in the case at bar is extremely speculative. In the first instance, it must be recognized that the available empirical evidence does not support the proposition that the exclusionary rule in general is successful in deterring such conduct. [Dallin H. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 755 (1970).] One major suggested explanation for this evidence is that a large proportion of law enforcement activities, of which the challenged conduct in the instant case is an example, is simply not motivated by a desire to prosecute an offender [Oaks, *supra;* Charles Alan Wright, "Must the Criminal Go Free if the Constable Blunders" 50 Tex. L. Rev. 736, 740 (1977); John Kaplan, "The Limits of the Exclusionary Rule," 26 Stanford L. Rev. 1027, 1032 (1974); Harvey Wingo, "Growing Disillusionment With the Exclusionary Rule," 25 SWLJ 573, 576-77 (1971)]. Second, whatever deterrent effect the exclusionary rule

might have in general is significantly lessened when the evidence sought to be excluded is derivative evidence from a *Miranda* violation. Indeed, empirical evidence establishes that the giving of *Miranda* warnings has little effect on the decisions of most criminal defendants to speak [Note, "Interrogations in New Haven: The Impact of Miranda," 76 Yale L.J. 1519 (1967); Griffiths & Ayres, "A Postscript to the Miranda Project: Interrogation of Draft Protestors," 77 Yale L.J. 300 (1967).] It would therefore be irrational for a law enforcement officer to deny a suspect *Miranda* warnings in the speculative hope of obtaining derivative evidence which would still have to be connected to the defendant by evidence independent of his statement when the giving of such warnings may well result in an admissible confession. Finally, whatever deterrent effect the exclusion of the derivative evidence might otherwise have is completely eliminated when we consider that Officer Kraft acted in good faith. Indeed, one federal circuit has already held that the exclusionary rule need never be applied where an officer acts in "good faith and in the reasonable, though mistaken, belief" that the action is authorized [*United States* v. *Williams*, 622 F.2d 830, 840 (5th Cir. 1980), *cert. denied* 449 U.S. 1127 (1981)]. While this Court has not yet determined this issue [but, see *Michigan* v. *De Fillippo*, 443 U.S. 31 (1979), in which this Court held proper an arrest made in good faith reliance on an ordinance which was subsequently declared unconstitutional], it is clear that *Tucker* held the officer's good faith to be a very significant factor in deciding the admissibility of evidence obtained derivatively from a *Miranda* violation.

While the deterrence rationale in the instant case is highly unpersuasive, the "trustworthiness" rationale is

even less persuasive. There simply can be no more trustworthy evidence of the crime of criminal possession of a weapon than the weapon itself. Further, there is no reason to doubt the trustworthiness of the defendant's admissions of ownership of the weapon which were made after the administration of *Miranda* warnings.

As in *Tucker*, therefore, there would be little, if any, purpose served by exclusion of the derivative evidence in this case, even assuming a violation of *Miranda*. When this is balanced against the substantial detriment that an admitted felon must go free if the evidence is excluded, it becomes clear how the interests of the public would best be served.

B. Evidence Which Would Inevitably Have Been Discovered Absent Unlawful Police Conduct Need Not Be Suppressed.

Even if Officer Kraft's question regarding the location of the defendant's gun be considered a violation of the Fifth Amendment itself, there is still no reason to suppress the gun or his subsequent admissions of ownership of it. After Kraft had frisked the defendant and located his empty shoulder holster, he knew with a high degree of certainty that the defendant's gun was within the immediate vicinity of the encounter. He undoubtedly would have searched for it in the carton a few feet away from the defendant without the defendant having pointed it out. The gun having been lawfully obtained, there is no reason to believe that the subsequent statements of the defendant, made after *Miranda* warnings, wuold not have been made. Under the circumstances, no purpose is served by suppression of this evidence.

While this Court has never explicitly adopted the "inevitable discovery" exception to the exclusionary rule, it has recognized its existence without unfavorable comment. In *Brewer* v. *Williams*, 430 U.S. 387, 406 n. 12 (1977), after holding the defendant's statement regarding the location of a body inadmissible in violation of the Sixth Amendment right to counsel, the majority of this Court disputed the minority's contention that it would probably be futile to retry the defendant by saying "evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event even had incriminating statements not been elicited from Williams." Indeed, the Court's prediction turned out to be correct as the described evidence was held to be admissible in an exhaustive opinion of the Iowa Supreme Court in *State* v. *Williams*, 285 N.W.2d 248 (1979), *cert. denied*, 446 U.S. 921 (1980). Later, in *United States* v. *Crews*, 445 U.S. 463, 470 (1980), this Court referred to "inevitable discovery" as one "of three commonly advanced exceptions to the exclusionary rule."

The doctrine of inevitable discovery is derived from this Court's opinion in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), the first case to hold derivative evidence suppressible under the exclusionary rule. In an oft-quoted passage, the Court commented (at p. 392):

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be

> proved like any other, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.

While this passage is subject to varying interpretations, it has been suggested that it was intended to mean that evidence only constitutes a fruit of a prior violation if it can be said that "but for" the violation, the evidence would not have been found [3 W. La Fave, *Search and Seizure*, §11.4 at 617 (1978)]. This, of course, is another way of saying that if the evidence would inevitably have been discovered absent the violation, it need not be suppressed.

Evidence that this Court has interpreted *Silverthorne* as establishing a "but for" test is provided by its opinion in *Wong Sun* v. *United States*, 371 U.S. 471 (1963). After noting that *Silverthorne* was inapplicable because the prosecutor had admitted that the evidence would not have been obtained but for the illegal action, the Court refined the test as follows (371 U.S. at p. 488):

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt 221 (1959).

The doctrine of inevitable discovery, then, is perfectly consistent with this Court's opinions on the subject of derivative evidence.

This Court's characterization of the doctrine as "commonly advanced" in *United States* v. *Crews, supra,* is an understatement. Virtually every court which has considered the doctrine has adopted it. [See, *inter alia, United States* v. *Brookins,* 614 F.2d 1037 (5th Cir. 1980); *United States* v. *Leonard,* 630 F.2d 789 (10th Cir. 1980); *United States* v. *Melvin,* 596 F.2d 492 (1st Cir. 1979), *cert. denied* 444 U.S. 837 (1979); *United States* v. *Schmidt,* 573 F.2d 1057 (9th Cir. 1978), *cert. denied* 439 U.S. 881 (1978); *United States* v. *Jarvis,* 560 F.2d 494 (2d Cir. 1977), *cert. denied* 435 U.S. 934 (1978); *United States ex rel. Owens* v. *Twomey,* 508 F.2d 858 (7th Cir. 1974); *Government of the Virgin Islands* v. *Gereau,* 502 F.2d 914 (3rd Cir. 1974); *United States* v. *Seohnlein,* 423 F.2d 1051 (4th Cir. 1970), *cert. denied,* 399 U.S. 913 (1970); *Wayne* v. *United States,* 318 F.2d 205 (D.C. Cir. 1963), *cert. denied* 375 375 U.S. 860 (1968); *State* v. *Allies,* 606 P.2d 1043 (Mont. 1980), *app. after remand* 621 P.2d 1080 (1981); *State* v. *Phelps,* 297 N.W.2d 769 (N.D. 1980); *State* v. *Williams, supra; Leuschner* v. *State,* 397 A.2d 622 (Md. App. 1979), *cert. denied* 444 U.S. 933 (1979), *rehearing denied* 444 U.S. 1027 (1980); *State* v. *Papp,* 64 Ohio App. 2d 203, 412 N.E.2d 401 (1978); *People* v. *Pearson,* 67 Ill. App. 3d 300, 24 Ill. Dec. 173, 384 N.E.2d 1331 (2d Div. 1978); *State* v. *Paz,* 31 Or. App. 851, 572 P.2d 1036 (1977); *Briggs* v. *State,* 76 Wis. 313, 251 N.W.2d 12 (1977); *Commonwealth* v. *Brown,* 470 Pa. 274, 368 A.2d 626 (1977); *People* v. *Horton,* 49 Ill. App. 3d 531, 364 N.E.2d 551 (1st Dist. 1977); *State* v. *Mather,* 147 N.J. Super. 522, 371 A.2d 758 (1977); *Bartram* v. *State,* 33 Md. App. 115, 364 A.2d 1119 (1976), *aff'd* 280 Md. 616, 374 A.2d 1114 (1971); *Rhodes* v. *State,* 530 P.2d 1199 (Nev. 1975); *Morrison* v. *State,* 129 Ga. App. 558 (1973), 200 S.E.

2d 286 (1973); *People* v. *Fitzpatrick*, 32 N.Y.2d 499 (1973), *cert. denied* 414 U.S. 1033 (1973); *State* v. *Tillery*, 107 Ariz. 34, 481 P.2d 271 (1971), *cert. denied* 404 U.S. 847 (1971); *Lockridge* v. *Superior Court of Los Angeles County*, 3 Cal. 3rd 150, 89 Cal. Rptr. 721, 474 P.2d 673 (1970).] In Oregon, this rule has even been codified (O.R.S. 133.683).

In what is probably the leading commentary on the subject, the inevitable discovery doctrine or "*sine qua non* test," as it is there called, is approved in that it "serves well the *raison d'etre* of the exclusionary rule by denying to the government the use of evidence 'come at by the exploitation of . . . illegality' and at the same time minimizes the opportunity for the defendant to receive an undeserved and socially undesirable bonanza." [Robert F. Maguire, "How To Unpoison the Fruit, the Fourth Amendment and the Exclusionary Rule", 55 Journal of Criminal Law, Criminology, and Police Science 307, 317 (Sept. 1964).] Another commentary terms it "a valuable, logical and constitutional principle" which is a logical refinement of the *Silverthorne* test. [Stephen H. La Count and Anthony J. Girese, "The Inevitable Discovery Rule: An Evolving Exception to the Constitutional Exclusionary Rule," 40 Albany Law Review 483, 511 (1976).]

The "inevitable discovery" rule has sometimes been said to involve a hypothetical independent source [White, J., dissenting from denial of *certiorari* in *Fitzpatrick* v. *New York*, 414 U.S. 1050, 1051 (1973); *State* v. *Williams*, *supra*.] What is actually being hypothesized, however, is not the information available to the police independently of the illegal

conduct inasmuch as what must be a matter of record for the doctrine to apply. Rather, what is being hypothesized is the fact that the police, or some other individual, would have taken some action which would have led to the discovery of the evidence in the absence of the illegality. Where the action hypothesized is an extensive one, testimony may be necessary to establish that it would have been engaged in [Eg., *United States* v. *Falley*, 489 F.2d 33 (2d Cir. 1973) (government would have conducted a "saturation investigation"); *Government of Virgin Islands* v. *Gereau, supra* (government was making a "massive effort" to find the killers and the gun)]. Where, as here, the location of the evidence is obvious, however, no such extensive action need be hypothesized in order to establish that it would have inevitably been discovered. Accordingly, testimony regarding what normal police procedures would have been is entirely superfluous [Note, "The Inevitable Discovery Exception to the Constitutional Exclusionary Rules", 74 Colum. L.Rev. 88, 91, 96 (1974)]. Some of the best illustrations of this principle are the cases in which inevitable discovery has been employed as an alternative ground for holding that a weapon found in the immediate vicinity of a defendant who was believed to be armed need not be suppressed merely because the defendant had revealed its location while in custody in response to an inquiry by a police officer without the benefit of *Miranda* warnings. [*United States* v. *Melvin, supra; United States* v. *Ganter, supra; Briggs* v. *State, supra; People* v. *Fitzpatrick, supra; Cook* v. *State*, 8 Md. App. 243, 259 A.2d 326 (1969); *People* v. *Superior Court for Santa Clara County*, 3 Cal. App. 3d 491, 83 Cal. Rptr. 771 (1st Dist. 1970).] In each case, the obvious nature of the location of the weapon

obviated the necessity for testimony regarding normal police procedure. Since Officer Kraft, in the instant case, found the defendant's gun in a carton approximately four feet from where the defendant was standing (17a), no such testimony was necessary to establish that he would have found it without the defendant's statement. Accordingly, any contention that such testimony is lacking, or that the defendant had no opportunity at the hearing to refute such testimony and that that somehow renders the issue "unpreserved" is entirely beside the point.

In *Nardone* v. *United States*, 308 U.S. 338, 340 (1939), the case which first articulated the attenuation doctrine later adopted in *Wong Sun*, this Court stated:

> Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land.

No such overriding public policy exists in the case at bar.

Conclusion

For the Reasons Stated Above It Is Respectfully Requested That the Order of the Court of Appeals of the State of New York Be Reversed.

Respectfully submitted,

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